WISMA DENMARK SDN BHD

v.

LANDCORP FINANCE LTD

HIGH COURT MALAYA, KUALA LUMPUR
TENGKU MAIMUN JC
[SUIT NO: S4-24-183-2006]
12 MARCH 2007

CONTRACT: *Sale and purchase of land - Terms and conditions - Whether balanced - Conditions precedent - Whether time of essence - Specific performance - Consideration - Undue advantage - Whether agreements void - Contracts Act 1950, s. 26 - Specific Relief Act 1950, s. 27(a)*

The plaintiff sought an order or declaration that a sale and purchase agreement dated 10 September 2005, a procurement agreement dated 10 September 2005 and a supplementary agreement dated 21 September 2005 ('agreements') entered into between the plaintiff and the defendant regarding two properties valued at approximately RM135,000,000 and RM30,000,000 respectively ('properties') were void and/or *void ab initio* and invalid, and for judgment to be entered against the defendant for damages to be assessed and costs. The sum of SGD$500 (equivalent to approximately RM1,100) was paid by the defendant as consideration for the purchase of the properties. The sale and purchase agreement provided for a condition precedent *ie*, within one month of the date of the agreement, the defendant shall obtain the approval from its Board of Directors of the entry into the agreement and the acquisition of the properties, and there was also a condition precedent for approval by the Foreign Investment Committee. Similar provisions were also contained in the supplementary agreement. When the deadline passed with no monies forthcoming from the defendant, the plaintiff became suspicious and sought legal advice. Upon finding out that the defendant's alleged director was an ex-convict who had served an imprisonment sentence in Singapore for criminal breach of trust, the plaintiff filed a police report and brought this action against the defendant.

Held (allowing the plaintiff's application and dismissing the defendant's counterclaim):

(1) Having regard to the surrounding facts and circumstances of this case in totality, the plaintiff had proven its claim against the defendant. The glaring omission by the defendant to exhibit the purported approval lent proof to the plaintiff's case that the condition precedent was not fulfilled in respect of the defendant's Board of Directors' approval. In so far as the approval of the Foreign Investment Committee was concerned, although there had been no application made by the defendant pursuant to the agreements, the plaintiff did write to the Foreign Investment Committee on 31 October 2006 enclosing the pertinent documents relating to the proposed sale of the properties to the defendant, whereupon the Foreign Investment Committee rejected the application *vide* its letter dated 3 November 2006. In this case, time was of the essence and the approval of the defendant's Board of Directors and the Foreign Investment Committee were conditions precedent which had not been fulfilled. The payment of RM1,100 by the defendant did not form the required consideration for the purchase of the properties worth more than RM150,000,000. The terms and conditions of the agreements were clearly not balanced, the effect of the various provisions being that the defendant would get the two properties belonging to the plaintiff with no cost at all except for the RM1,100, whereas the plaintiff would be deprived of both properties for a meagre RM1,100. That in itself showed undue advantage, and for want of consideration, the agreements were void under s. 26 of the Contracts Act 1950. As for the defendant's counterclaim for specific performance, s. 27(a) of the Specific Relief Act 1950 provided against it. (paras 23, 24, 25, 26, 27, 28 & 29)

Case(s) referred to:

Credit Lyonnais Bank Nederland NV v. Burch [1997] 1 All ER 144 ***(refd)***

Jaafar Ibrahim v. Gan Kim Kin [1984] 2 CLJ 175; [1984] 2 CLJ (Rep) 89 HC ***(refd)***

Kumarasamy Sengainy & Ors v. Revathy Development (M) Sdn Bhd [1994] 1 LNS 180 HC ***(refd)***

Omar Mat Ziki v. Mokhtar Amin [1996] 1 LNS 62 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 26, 36(1)

Specific Relief Act 1950, s. 27

For the plaintiff - Dato' David Lingam (Dato' VK Lingam, M Cheransingam & Sharon with him); M/s David Lingam & Co
For the defendant - Harjinder Kaur (Sharon & J Sharma with her); M/s Shahrizat Rashid & Lee

Reported by Suresh Nathan

JUDGMENT

Tengku Maimun JC:

[1] By the originating summons the plaintiff is seeking for an order or declaration that the Sale and Purchase Agreement dated 10 September 2005, the Procurement Agreement dated 10 September 2005 and the Supplementary Agreement dated 21 September 2005 (the agreements) entered into between the plaintiff and the defendant are void and/or voidable *ab initio* and invalid and for judgment to be entered against the defendant for damages to be assessed and costs.

[2] The plaintiff's application was supported by an affidavit affirmed by the Chairman, Tan Sri Ibrahim bin Mohamed (encl. 7) deposing to the background facts and circumstances leading to the execution of the agreements. The plaintiff is the registered owner of a piece of land with an office building known as Wisma Denmark situate at 86, Jalan Ampang, Kuala Lumpur held under Grant 45110 Lot 55 Section 45 approximately valued at RM135,000,000 (the first property) and 5 pieces of vacant land within the vicinity of the first property approximately valued at RM30,000,000 held under Grant 12371, Grant 27736, Grant 27733, Grant 4488 and Grant 9940 respectively, all in Section 45, Town of Kuala Lumpur (the second property). The first property and the second property will hereinafter be referred to as "the properties".

[3] Prior to September 2005, the properties were charged to Danaharta Manager Sdn Bhd (Danaharta) as collateral for loans taken by the plaintiff since 1996. By a letter dated 15 July 2005, Danaharta demanded that the plaintiff settle an amount of RM20,500,000 (the outstanding amount) by 31 August 2005 failing which it would foreclose the second property. Due to the plaintiff having difficulty raising the required funds within the short

time frame, an extension was asked for by the plaintiff and was granted by Danaharta until 30 September 2005 (exhs. TSI3 and TSI4 encl. 6).

[4] To avoid foreclosure of the second property and it having tremendous development potential, the plaintiff decided to sell the first property at its market value of about RM135,000,000 and after repayment of a loan on the first property amounting to approximately RM40,000,000 use its balance sale proceeds to settle the outstanding amount owing on the second property. The idea is to enable the plaintiff to retain the second property free of encumbrance and with the surplus funds, to develop it to its full potential.

[5] In mid-2005 the plaintiff was introduced by one Encik Abdul Aziz bin Abdullah from the Maybank Group to Raj Kumar as one of the two brothers known as "the Royal Brothers" from Singapore. Raj Kumar represented himself to be the Director of the defendant which is a company registered in the British Virgin Islands (BVI).

[6] On 9 September 2005 Raj Kumar met Tan Sri Ibrahim, at the latter's office at Wisma Denmark and had expressed an intention to purchase the properties. The plaintiff was offered RM135 million for the first property and RM21 million for the second property together with 30% of the profits from the redevelopment of the second property. At the meeting Raj Kumar had represented to Tan Sri Ibrahim the ability and financial strength of himself and the defendant and that they were successful, reputable and international class property developers. Raj Kumar proposed the plaintiff to execute a formal Sale and Purchase Agreement for the properties with the defendant so that he could approach banks to secure financing in order to clear the outstanding amount and at material times it was open to the plaintiff to source and obtain offers from third parties (exh. TSI11 encl. 7). Tan Sri Ibrahim avers that an assurance was given by Raj Kumar that the plaintiff would not require the services of a lawyer and at all material times, he had full trust in Raj Kumar and the representations made.

[7] On 10 September 2005 Raj Kumar attended Tan Sri Ibrahim's office with Ms. Loo May Pearl from the law firm of Messrs Shahrizat Rashid & Lee (the defendant's solicitors) who was to prepare the agreement. The Sale and Purchase Agreement

was accordingly prepared by the defendant's solicitor and was signed by Tan Sri Ibrahim's daughter, Aishaf Falina bt Ibrahim on behalf of the plaintiff and Kishin Hiranandani, the son of Raj Kumar on behalf of the defendant at almost midnight on 10 September 2005 (exh. TSI2 encl. 7). Raj Kumar paid the plaintiff SGD$500 which is equivalent to approximately RM1,100 for signing the Sale and Purchase Agreement. At the same time the Procurement Agreement was also signed (exh. TSI7 encl. 7).

[8] The plaintiff avers that the Sales and Purchase Agreement did not correctly record the purchase price of the first property as RM135,000,000 but as RM105,000,000 and the RM135,000,000 was stated to be the consideration for both properties. This led to the discussion with Raj Kumar whereupon a Supplementary Agreement was prepared by the defendant's solicitor and signed by the parties on 21 September 2005. This time a sum of RM10 was to be paid by the defendant to the plaintiff as consideration which sum was actually never paid. (exh. TSI9 encl. 7).

[9] The Sale and Purchase Agreement provided for condition precedent ie, within one month of the date of the agreement, the defendant shall obtain the approval from its Board of Directors of the entry into the agreement and the acquisition of the properties and there is also a condition precedent for the approval by the Foreign Investment Committee (cls. 2(f) and 2.1.2 exh. TSI2 encl 7). Similar provisions were also contained in the Supplemental Agreement (cl. 7.2.1.4 exh. TSI9 encl. 7).

[10] The Supplementary Agreement further provided that the first property was to be transferred to a new joint venture company to be set up by Raj Kumar (Newco 1). Newco 1 would raise sufficient funds by mortgaging the first property to financial institution to pay off the first property's existing loan of RM40,000,000. The remaining balance of RM95,000,000 of the purchase price would be in the form of Redeemable Convertible Preference Shares in Newco 1 to be issued to the plaintiff. Newco 1's capital and equity structure was a nominal RM1,000 reflecting 1000 shares of RM1 par value, 70% of which would be issued in favour of the defendant and the balance 30% to the plaintiff (cl. 4.2 and Annexure 1 exh. TSI9 encl. 7).

[11] The Sale and Purchase Agreement also provided that all rental proceeds in respect of the tenancies in Wisma Denmark would go to the defendant as all existing tenancies would have to be assigned to the defendant and any fresh tenancies would have to be executed in favour of the defendant (cl. 4.1(v) exh. TSI2 encl. 7).

[12] The second property was also to be transferred to a joint venture company (Newco 2) and instead of the plaintiffs getting RM21,000,000 for the lands, they were to get Redeemable Convertible Preference Shares *in lieu* of the cash. The shares could only be converted into cash if Newco 2 made sufficient profits from the redevelopment of the second property. It was further provided that the revenue from the redevelopment was to pay off all the debts of Newco 2 and Newco 1. Newco 2 is again controlled and owned by Raj Kumar with a meagre paid up capital of RM1,000 (cl. 5 and Annexure 1 exh. TSI9 encl. 7).

[13] The Sale and Purchase Agreement also provided that the plaintiff was to give various forms of security to guarantee a seven year yield of 8% per annum on RM135,000,000 although the consideration of the first property was stated as RM105,000,000 (cl. 2.1.1(e) exh. TSI2 encl. 7). Under the Supplementary Agreement, the plaintiff was required to maintain the yield guarantee as described above in favour of the defendant although the first property was to be transferred to to Newco 1; plaintiff was to pledge 51 % shares of their paid up capital in TSI Holdings Sdn Bhd (TSIHSB); assign all dividends to be derived from 75% of the equity held by the plaintiff in TSIHSB; assign the rental proceeds of approximately RM250,000 per month for 2 plots belonging to Fawanis Sdn Bhd, a family owned company of Tan Sri Ibrahim; the appointment of a nominee of Raj Kumar to the Board of Fawanis with a golden share with full veto rights over shareholders and board decisions and the plaintiff was to place a cash deposit of RM7 million with the defendant (cl. 7 exh. TSI9 encl. 7).

[14] Clauses 1.1 and 2.1 of the Procurement Agreement provided that in consideration of the defendant's endeavour to obtain facility from the financier, the plaintiff shall pay the defendant the procurement fees of 2.5% of RM21,000,000 (exh. TSI7 encl. 7).

[15] In the event of default of performance by the plaintiff, there was a provision for liquidated damages against the plaintiff but similar provision was absent against the defendant (cls. 15 and 16 exh. TSI2 encl. 7). A

[16] The dateline 30 September 2005 passed by and no monies were forthcoming from the defendant. The outstanding amount to Danaharta was then settled by the plaintiff through monies borrowed from family members. Only then did the plaintiff become suspicious of the defendant's intentions and representations and the plaintiff then sought legal advice. It turned out that Raj Kumar was an ex-convict having served an imprisonment sentence in Singapore for criminal breach of trust in 1999 (exh. TSI13 encl. 7). A police report was lodged by Tan Sri Ibrahim's daughter on 5 December 2005 and subsequently on 3 February 2006 this action was brought against the defendant. B C D

[17] It is the contention of the plaintiff that the defendant had taken advantage of the fact that the plaintiff was under pressure to settle the outstanding sum and the learned counsel for the plaintiff in his submission raised *inter alia* the issues of lack of transparency and authority; lack of consideration; non-fulfillment of condition precedent and undue influence and unconscionable conduct and constructive fraud. There is, submitted learned counsel for the plaintiff, a cloud of secrecy concerning the defendant which is declared to be a company registered in the BVI. No company search could be done, the directors or shareholders are not known; neither is the paid up or authorized capital of the defendant. Hence the learned counsel submitted that the very existence of the defendant company is in question since it could very well be a phantom company. E F G

[18] Learned counsel for the plaintiff further submitted that there was absolutely no consideration paid for the purported purchase. Citing the case of *Omar bin Mat Ziki v. Mokhtar bin Amin* [1996] 1 LNS 62, the learned counsel for the plaintiff submitted that the agreements entered into between the plaintiff and the defendant are void and unenforceable pursuant to s. 26 of the Contracts Act 1950. H

[19] As regards the non-fulfillment of the conditions precedent, learned counsel for the plaintiff contended that since time is of the essence, the agreements are void and of no effect on the authority of *Kumarasamy a/l Sengainy & Ors v. Revathy Development (M) Sdn Bhd* [1994] 1 LNS 180. I

[20] On fraudulent intentions and unconscionable conduct, learned counsel for the plaintiff cited the Procurement Agreement where the plaintiff was to pay the defendant a procurement fees of 2.5% of RM21,000,000 which is an extraordinary scheme of the defendant extracting RM525,000 from the plaintiff for doing what the defendant is expected to do as any purchaser of a property. The learned counsel for the plaintiff also submitted that pursuant to s. 27 of the Specific Relief Act 1950 specific performance of the agreements could not be enforced against the plaintiff.

[21] In response to the plaintiff's claim the defendant filed an affidavit in reply (encl. 15A) affirmed not by Raj Kumar the person who had been in discussion with Tan Sri Ibrahim but one Kishin Hiranandani, purported to be the director of the defendant. *Vide* para. 5 of encl. 15A the deponent avers that on 28 September 2005, the defendant's Board of Directors had given approval for the entry into the Sale and Purchase Agreement and the acquisition of the properties which purported approval was not however exhibited. The defendant denies the plaintiff's allegation on the undue influence and the representation that the plaintiff need not require services of a solicitor but admitted to the payment of RM1,100 as the consideration for the Sale and Purchase Agreement and to the consideration of RM10 for the Supplementary Agreement. *Vide* para. 6 of encl. 15A the defendant counter claimed for the specific performance of the agreements.

[22] The learned counsel for the defendant in her submission *inter alia* cited the case of *Credit Lyonnais Bank Nederland NV v. Burch* [1997] 1 All ER 144 which laid down the circumstances to prove unconscionable bargain ie, poverty and ignorance; sale at an undervalue and the disadvantaged party is deprived from any independent advice, which circumstances contend learned counsel, are absent in the instant case.

[23] Having regard to the surrounding facts and circumstances of this case, it is my view that in totality the plaintiff has proven its claim against the defendant. The glaring omission by the defendant to exhibit the purported approval in my view lends proof to the plaintiff's case that the condition precedent is not fulfilled in respect of the defendant's Board of Directors' approval.

[24] In so far as the approval of the Foreign Investment Committee is concerned, although there has been no application made by the defendant pursuant to the agreements, the plaintiff did write to the Foreign Investment Committee on 31 October 2006 enclosing the pertinent documents relating to the proposed sale of the properties to the defendant whereupon the Foreign Investment Committee rejected the application *vide* its letter dated 3 November 2006.

[25] In the case of *Jaafar Ibrahim v. Gan Kim Kin* [1984] 2 CLJ 175; [1984] 2 CLJ (Rep) 89 time was not merely of the essence of the contract but fulfilment of the promise by the appellant to obtain the approval of the State Authority for conversion and sub-division of the land on or before 31 December 1977 was a condition precedent of the whole contract. Since the event had not happened by the dateline the contract was held by the Supreme Court to be void under s. 36(1) of the Contracts Act 1950.

[26] Similarly in this case time was of the essence (cl. 20 exh. TSI2 encl. 7) and the approval of the defendant's Board of Directors and the Foreign Investment Committee were the conditions precedent which have not been fulfilled.

[27] I find that the payment of RM1,100 by the defendant do not form the required consideration for the purchase of the properties worth more than RM150,000,000. The terms and conditions of the agreements are clearly imbalanced, the effect of the various above-quoted provisions is that the defendant would get the two properties belonging to the plaintiff with no cost at all except for the RM1,100 whereas the plaintiff would be deprived of both properties for a meagre RM1,100. In my view, that in itself shows undue advantage and for want of consideration, I hold that the agreements are void under s. 26 of the Contracts Act 1950.

[28] Based on the foregoing the plaintiff's application is allowed with costs. As for the defendant's counter claim for specific performance, the answer is found in s. 27 of the Specific Relief Act 1950 which provides:

A Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;

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(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices, of any party to whom performance would become due under the contract, or by the promise of the party which has not been substantially fulfilled; or

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(c) if his assent was given under the influence of mistake of fact, misapprehension, or surprise;

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[29] Clearly the instant situation falls under para. (a). Hence pursuant to s. 27 abovementioned, the defendant's counter claim is dismissed with costs.

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